



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120604138-3684-03]

RIN 0648-BC21

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule reopens an additional portion of the Georges Bank Closed Area to the harvest of Atlantic surfclams and ocean quahogs. This final rule follows up on a preceding interim final rule that was published in the Federal Register on December 19, 2012. The previous interim final rule reopened a portion of the Georges Bank Closed Area that had been closed to the harvest of Atlantic surfclams and ocean quahogs since 1990 due to the presence of toxins known to cause paralytic shellfish poisoning. However, the area reopened in the interim final rule was reduced in size from the area identified in the proposed rule. Based on comments received on the interim final rule and requests from the New England and Mid-Atlantic Fishery Management Councils, this final rule will reopen an additional portion of the Georges Bank Closed Area.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: An environmental assessment (EA) was prepared for this action that describes the final action and other alternatives considered, and provides an analysis of the impacts of the measures and alternatives. Copies of the EA are available on request from the NMFS Northeast Regional Administrator, John K. Bullard, 55 Great Republic Drive, Gloucester, MA 01930. The EA is also available online at <http://www.nero.noaa.gov/>

FOR FURTHER INFORMATION CONTACT: Jason Berthiaume, Fishery Management Specialist, phone (978) 281-9177, fax (978) 281-9135.

SUPPLEMENTARY INFORMATION: The Georges Bank (GB) Closed Area, located in the Exclusive Economic Zone east of 69°00' W. longitude and south of 42°20' N. latitude, has been closed to the harvest of surfclams and ocean quahogs since 1990 due to red tide blooms that cause paralytic shellfish poisoning (PSP). The closure was implemented based on advice from the U.S. Food and Drug Administration (FDA), after samples tested positive for the toxins (saxitoxins) that cause PSP. Shellfish contaminated with the toxins, if eaten in large enough quantity, can cause illness or death in humans.

Due to inadequate testing or monitoring of this area for the presence of PSP-causing toxins, the closure was made permanent in 1999. Since the implementation of the closure, NOAA's National Ocean Service has provided grants to the FDA, the states of Maine, New Hampshire, and Massachusetts, and a clam industry representative to collect water and shellfish samples from Federal waters off southern New England. NMFS has also issued exempted fishing permits (EFPs) since 2008 to surfclam and ocean quahog vessels to conduct research in the closure area.

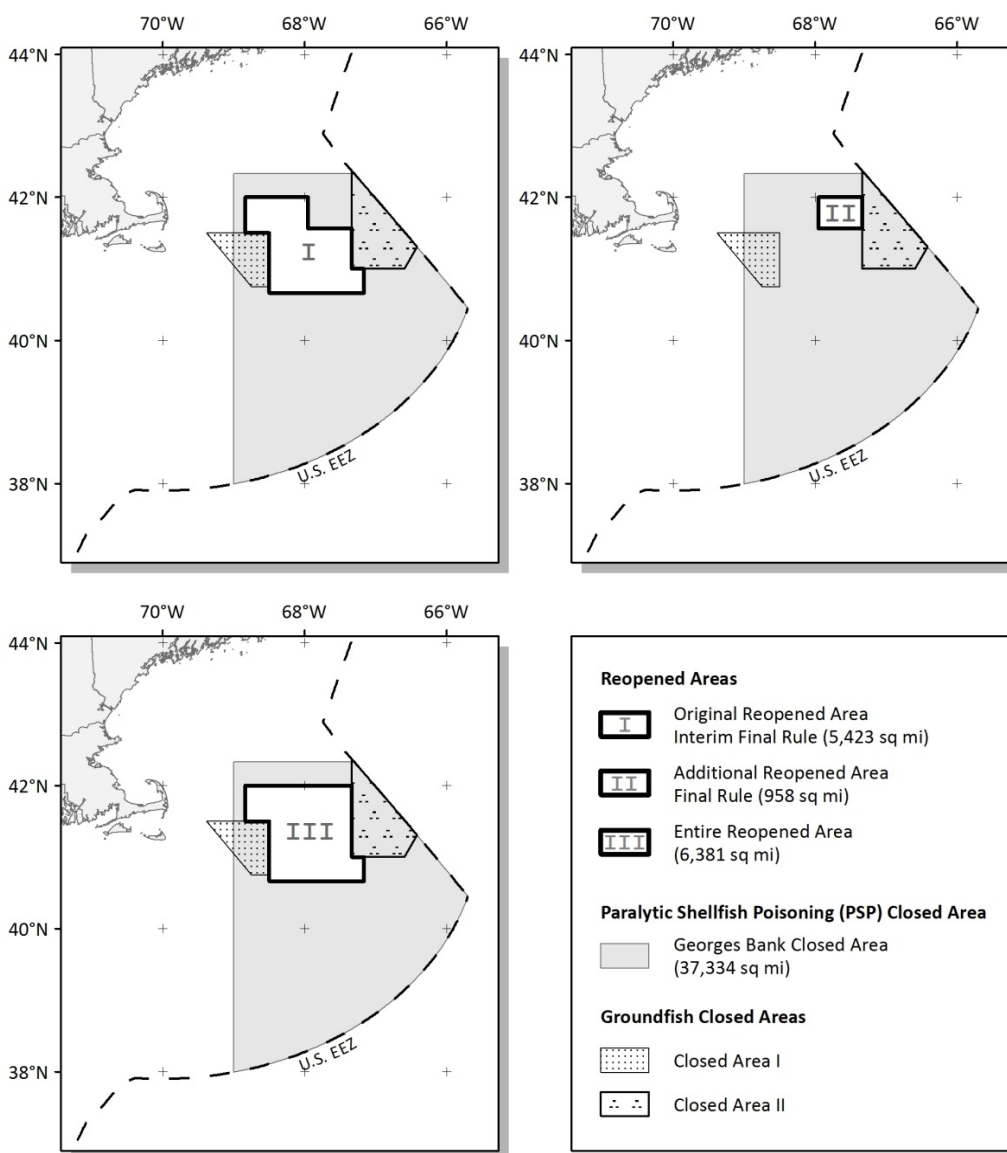
Testing of clams in the area by the FDA in cooperation with NMFS and the fishing industry under the EFPs demonstrate that PSP toxin levels have been well below the regulatory limit established for public health and safety (FDA 2010)<sup>1</sup>. The FDA and NMFS also developed a Protocol for Onboard Screening and Dockside Testing in Molluscan Shellfish that is designed to test and verify that clams harvested from the GB PSP Closed Area are safe. The protocol was formally adopted into the National Shellfish Sanitation Program at the October 2011 Interstate Shellfish Sanitation Conference.

On August 31, 2012, NMFS published a proposed rule in the Federal Register (77 FR 53164) proposing to reopen a portion of the GB PSP Closed Area. On December 19, 2012, we published an interim final rule in the Federal Register (77 FR 75057) that reopened a portion of this area. However, in response to comments received on the proposed rule, the area reopened with the interim final rule was modified slightly from the area in the proposed rule. The interim final rule had a 60-day comment period to allow for additional comments on the modified area. NMFS has reviewed comments received on the interim final rule, and this final rule will reopen the area as originally proposed. That is, in addition to the area that was reopened in the interim final rule, this final rule reopens an additional 958 square miles (2,481 square km) of the GB PSP Closed Area for the harvest of surfclams and ocean quahogs, provided vessels fishing in the area obtain a Letter of Authorization from NMFS and comply with all the terms of the approved PSP testing protocol.

---

<sup>1</sup> January 10, 2010, letter from Donald W. Kraemer, Deputy Director, Office of Food Safety, Food and Drug Administration to Patricia A. Kurkul, Regional Administrator, NOAA's NMFS

The area being reopened is defined in the table below and the remaining portion of the GB Closed Area will remain closed. The area identified by the coordinates contain both the area reopened with the interim final rule (77 FR 75057) and the additional area being reopened with this final rule.



Point	Latitude	Longitude
1	42°00'	68°50'
2	42°00'	67°20'
3	41°00'	67°20'
4	41°00'	67°10'
5	40°40'	67°10'
6	40°40'	68°30'
7	41°30'	68°30'
8	41°30'	68°50'
1	42°00'	68°50'

## Public Comments

The comment period for the interim final rule ended on February 19, 2013, and NMFS received 14 comments. One comment was against reopening any portion of the GB PSP Closed Area, but provided no supporting justification. The remaining 13 comments were in support of reopening additional portions of the GB Closed Area.

Comment 1: Eleven comments supported reopening additional areas and all provided similar rationale. These comments were from the fishing industry, dealers, and processors, as well as the New England (NEFMC) and Mid-Atlantic Fishery Management Councils (MAFMC). Primarily, the commenters pointed out that the majority of the GB Closed Area is open to other types of bottom-tending mobile gear, so it is not equitable that the area remain closed to surfclam and ocean quahog harvesting. The industry also stated that the resource is abundant on GB and the fishery would benefit from greater access to the resource.

Response: NMFS agrees that it may be justifiable to reopen some additional areas and that reopening additional areas may take some effort off of southern stocks, but, at this time, NMFS does not support reopening areas beyond the areas that were originally considered. The original areas that were analyzed were considered because the data demonstrate that the shellfish harvested from those areas have been and are currently safe for human consumption. This reopening was also based on a request from the MAFMC for a specific area to be reopened based upon the available data. The areas that were analyzed for this action were based on areas that were sampled under an EFP since 2008. None of the samples collected under the EFP presented results that would raise public health and safety concerns. Because the research was only conducted in specific areas, no additional data are available to support reopening additional areas. Further, NMFS defers to the FDA on matters of public health and safety and would need

further direction from the FDA and/or evidence that other areas outside of what was included in the analysis for this action are safe to reopen.

Comment 2: In addition to the comments discussed above in support of reopening additional areas, two additional comments supported reopening specifically the Northeast corner that was considered in the proposed rule, but was withdrawn in the interim final rule. All 13 of the comments received in support of reopening additional areas raised equity concerns because most of the GB Closed areas is open for other types of bottom-tending mobile gear, except hydraulic clam dredge gear. The two commenters also stated that the Northeast corner area that was withdrawn is being considered as a potential habitat management area (HMA) because it contains rocky and coral structure habitats. Further, because hydraulic clam dredges can only fish in sandy substrates, where recovery times are demonstrated to be short, and because hydraulic clam dredge gear sustains significant damage when fished in coral and rocky substrates, the hydraulic clam dredge gear would, by default, not fish in the rocky and coral structures of concern and would, therefore, not disturb these habitats. Finally, a number of the commenters state that they agree with the conclusion drawn in the interim final rule that impacts from hydraulic clam dredge gear in sandy substrates is demonstrated to be temporary and minimal, which would be the case in the Northeast corner area.

Response: NMFS agrees that because other types of bottom-tending mobile gear are already permitted for use in the potential HMA, it is unlikely that additional effort from the surfclam fishery will have significant additional habitat impacts or foreclose any future actions by the NEFMC to establish a new habitat closed area in this location. The Atlantic surfclam fishery is carried out only in sandy substrates, where habitat recovery times for hydraulic dredge gear have demonstrated to be relatively short. In addition, the areas that are being considered as

HMAAs, are being considered because they contain areas with rocky and coral structures.

Because hydraulic clam dredge gear does not operate in these substrates, it is not likely that the rocky and coral substrates will be affected.

Further, most of the area in the Northeast corner, which was withdrawn in the interim final rule, is located in a relatively shallow (30-60 m) part of GB that is routinely highly disturbed by strong tidal currents and wave action from storms. Published studies of the effects of hydraulic clam dredges in high-energy, sandy habitats, such as those where clam fishing occurs, indicate that in this type of environment the affected physical and biological features of the seafloor can be expected to recover from the impacts of this gear in less than a year, and can actually recover within a matter of a few days or months. For this reason, NMFS agrees that the minimal or temporary impacts caused by the use of this gear would not have significant impacts on habitat in the affected area.

#### Changes from Interim Final Rule

As noted above, in response to comments received on the proposed rule, the area that was reopened with the interim final rule was modified slightly from the proposed rule. The NEFMC submitted a comment on the proposed rule informing NMFS that its Habitat Oversight Committee is developing Essential Fish Habitat Omnibus Amendment 2, which may include potential HMAAs that, if implemented, may spatially overlap with the areas proposed for reopening in the proposed rule. Because of the NEFMC concern, we modified the area that was reopened with the interim final rule to ensure that there was no overlap with any portion of the potential HMAAs. The intent was to protect the potential HMAAs from any additional disturbances, while also allowing the Atlantic surfclam/ocean quahog fleet to access as much of the proposed area as possible without compromising the proposed HMA.

The NEFMC also requested that we extend the comment period on the proposed rule for an additional 60 days to allow them time to compose a more formal comment. We did not extend the comment period on the proposed rule, but instead, we published an interim final rule, which included an additional 60-day comment period while also satisfying the industry's and the MAFMC's request to have the area reopened by the start of the Atlantic surfclam and ocean quahog fishing year on January 1, 2013.

The comment period on the interim final rule closed on February 19, 2013. We received an additional comment from the NEFMC, in which they rescinded their previous comment regarding concern with reopening the portion of the area that would overlap with the potential HMAs. Instead, the NEFMC requested that we reopen all portions of the GB PSP Closed Area that are open to other types of bottom-tending mobile gear.

In light of comments received on the interim final rule, we will reopen the portion of the closed area that was originally proposed, but which was not reopened based on the NEFMC's initial concern. The remainder of the GB PSP Closed Area will remain closed.

#### Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator for Fisheries, NOAA, has determined that this final rule is consistent with the Atlantic Surfclam and Ocean Quahog FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

The Assistant Administrator for Fisheries, NOAA, is waiving the 30-day delayed effectiveness provision of the Administrative Procedure Act, pursuant to 5 U.S.C. 553(d)(1), because this is "a substantive rule which ... relieves a restriction." This rule imposes no new requirements or burdens on the public; to the contrary, it provides economic benefits to the

fishery participants by reopening an additional area that has been closed to the harvest of surfclams and ocean quahogs since 1990 due to red tide blooms that cause PSP, without resulting in overfishing. Because recent testing in the GB Closed Area has demonstrated that PSP toxin levels were well below the regulatory limit established for public health and safety, continued closure of the area is not necessary and could unnecessarily restrict Atlantic surfclam and ocean quahog fishing.

Furthermore, the Assistant Administrator for Fisheries, NOAA has determined that there is good cause to waive the 30-day delay in effectiveness under 5 U.S.C. 553(d)(3). The GB PSP Closed Area has caused harvesting to be limited to the Mid-Atlantic, where Atlantic surfclam and ocean quahog stocks have recently become less abundant. A 30-day delay in effectiveness would continue to prohibit harvest from this portion of the GB PSP Closed Area and would continue to put pressure on Mid-Atlantic stocks. Waiving the 30-day delay would allow additional areas in the GB Closed Area to be reopened sooner, which could relieve fishing pressure on southern stocks and would allow for greater distribution of Atlantic surfclam and ocean quahog harvest effort in the region. We also received public comment on the proposed rule for this action that fishing is only being continued in the Mid-Atlantic region to maintain the market, and vessels may no longer be profiting. Thus, a delay in effectiveness could result in continued loss of revenue for the Atlantic surfclam and ocean quahog fishing fleet.

Failure to make this final rule effective upon publication will undermine the intent of the rule to promote optimal utilization and conservation of the Atlantic surfclam and ocean quahog resources. For these reasons, the 30-day delay is waived and this rule will become effective upon publication in the Federal Register.

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was provided in the proposed rule for this action (77 FR 53163) and is not repeated here. No comments were received regarding the certification and NMFS has not received any new information that would affect its determination. As a result, a final regulatory flexibility analysis is not required and none has been prepared.

On June 20, 2013, the Small Business Administration (SBA) issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398). The rule increased the size standard for Finfish Fishing from \$4.0 to \$19.0 million, Shellfish Fishing from \$4.0 to \$5.0 million, and Other Marine Fishing from \$4.0 to \$7.0 million. Pursuant to the Regulatory Flexibility Act, and prior to SBA's June 20, 2013, final rule, a certification was developed for this action using SBA's former size standards. Subsequent to the June 20, 2013, rule, NMFS has reviewed the certification prepared for this action in light of the new size standards. Under the former, lower size standards, all entities subject to this action were considered small entities, thus they all would continue to be considered small under the new standards. NMFS has determined that the new size standards do not affect the analyses prepared for this action.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: August 12, 2013

---

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

performing the functions and duties of the

Assistant Administrator for Fisheries,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 648.76, paragraph (a)(4) is revised to read as follows:

§ 648.76 Closed areas.

(a) \*\*\*

(4) Georges Bank. The paralytic shellfish poisoning (PSP) contaminated area, which is located on Georges Bank, and is located east of 69° W. long., and south of 42°20' N. lat. is closed to the harvest of surfclams and ocean quahogs. A portion of the Georges Bank Closed Area is open to harvest surfclams and ocean quahogs provided the vessel complies with the requirements specified in paragraph (a)(4)(i) of this section. The open portion of the Georges Bank Closed Area is defined by straight lines connecting the following points in the order stated:

Open Portion of the Georges Bank Closed Area		
Point	N. Latitude	W. Longitude
1	42°00'	68°50'
2	42°00'	67°20'
3	41°00'	67°20'
4	41°00'	67°10'
5	40°40'	67°10'
6	40°40'	68°30'
7	41°30'	68°30'
8	41°30'	68°50'
1	42°00'	68°50'

(i) Requirements for Vessels Fishing in the Open Portion of the Georges Bank Closed Area. A vessel may fish in the open portion of the Georges Bank Closed Area as specified in this paragraph (a)(4), provided it complies with the following terms and conditions:

(A) A valid letter of authorization issued by the Regional Administrator must be onboard the vessel; and

(B) The vessel must adhere to the terms and conditions of the PSP testing protocol as adopted into the National Shellfish Sanitation Program by the Interstate Shellfish Sanitation Conference. All surfclams and ocean quahogs harvested from the area must be handled in accordance with the terms and conditions of the protocol from the first point of harvest through

completion of testing and release by the State Shellfish Control Authority as required by the PSP testing protocol; and

(C) Prior to leaving port at the start of a fishing trip, the vessel's owner or operator must declare its intent to fish in the area through the vessel's vessel monitoring system.

(ii) [Reserved]

\*\*\*\*\*

[FR Doc. 2013-20028 Filed 08/15/2013 at 8:45 am; Publication Date: 08/16/2013]